

USDOL/OALJ Reporter

[Santamaria v. U.S. Environmental Protection Agency](#), 2004-ERA-6 (ALJ Feb. 24, 2004)

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Issue Date: 24 February 2004

Case No.: 2004-ERA-00006

In the Matter of

RAFAEL SANTAMARIA,
Complainant

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent

**RECOMMENDED DECISION AND ORDER GRANTING
RESPONDENT'S MOTION FOR SUMMARY DECISION
AND DENYING COMPLAINANT'S MOTION FOR SUMMARY DECISION**

On January 22, 2004, Respondent, U.S. Environmental Protection Agency, filed a Motion for Summary Decision and accompanying brief, pursuant to 29 C.F.R. §§18.40 and 18.41. Respondent argues that Complainant raises no genuine issues of material fact and cannot make a prima facie showing that he engaged in protected activities that would give this office jurisdiction over the instant matter, and therefore, summary decision is proper.

This case arises from a complaint filed, with the assistance of Counsel, by Complainant, Rafael Santamaria on April 30, 2003. On October 30, 2003, the Occupational Safety and Health Administration ("OSHA") advised Complainant that the investigation into his complaint had been completed, and based on the evidence, no indication of a violation of any whistleblower provisions was found. By letter dated November 4, 2003, counsel for Complainant requested a hearing on the complaint and also requested that Complainant's case be remanded to OSHA. The case was then assigned to the undersigned Administrative Law Judge. Pursuant to a Notice of Hearing issued on December 1, 2003, this matter was scheduled for hearing in Atlanta, Georgia, on January 20-22, 2004.

On January 6, 2004, a telephone conference was held with counsel for both parties and Complainant to discuss a dispute regarding the discovery deposition of Complainant. By order issued that same day, Complainant was ordered to appear in person for a discovery deposition on January 8, 2004. On January 9, 2004, Counsel for Respondent filed a motion for continuance of the formal hearing to permit the filing and resolution of a dispositive motion for summary decision. By order issued January 13, 2004, the hearing was cancelled, and Respondent was granted ten days to file its motion for summary decision. Complainant was permitted ten days after service of the motion for summary decision on Complainant's counsel to file a response.

Respondent's Motion for Summary Decision makes numerous references to Complainant's discovery deposition taken January 8, 2004; however, Respondent did not attach a copy of the deposition transcript as an exhibit to its motion. In a letter that accompanied Respondent's Motion, Respondent stated, "To my knowledge, Complainant has never reviewed the transcript nor purchased a copy." The court reporter filed the original of the deposition transcript with the Court, which was received January 22, 2004. On January 24, 2004, Complainant filed a motion that requested, among other things, that Respondent be ordered to serve a copy of Complainant's deposition transcript upon himself and his counsel.

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By order issued January 28, 2004, the original of Complainant's deposition transcript, which was identified as Government Exhibit Q, was admitted as part of Respondent's Motion for Summary Decision because the Motion referenced Complainant's testimony, and by having the court reporter forward the transcript to this office, offered the deposition transcript as an exhibit to its Motion. Because the deposition was admitted as an exhibit, counsel for Complainant should have received a copy of the transcript. A copy of the deposition transcript was forwarded to Complainant's counsel along with a copy of the January 28, 2004, order.¹ The order also granted Complainant an extension of time to file his response to the Motion for Summary Decision until the close of business on February 9, 2004. A response was received from Complainant on February 11, 2004, entitled "Mr. Rafael Santamaria's Motion for Summary Decision, His Response to EPA Motion for Summary Decision, and His Motion to Compel Full Discovery from EPA."

ISSUE

The issue presented in this motion for summary decision is whether a genuine issue of material fact exists with regard to whether, as a matter of law, Complainant engaged in protected activities such that this office would have jurisdiction over the instant matter.

DISCUSSION OF LAW AND FACTS

Any party may move with or without supporting affidavits for summary decision on all or part of a proceeding. 29 C.F.R. §18.40(a) (2003). If pleadings, affidavits, and material

obtained by discovery show that there is no genuine issue as to any material fact, the administrative law judge may enter summary decision for either party. *Id.* §§18.40(d), 18.41(a). In determining whether summary decision is appropriate, the court must look at the record in the light most favorable to the non-moving party and must draw all inferences in favor of the non-moving party. *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975) (quoting *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962)). To defeat a summary decision motion, the party opposing summary decision must establish the existence of an issue of fact that is both material and genuine. *Id.* at 464; *Gillilan v. Tennessee Valley Authority*, 1991-ERA-31, 1991-ERA-34, at 3 (Sec'y Aug. 28, 1995). If the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," there is no genuine issue of material fact, and the movant is entitled to summary decision. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). However, granting a summary decision motion is not appropriate where the information submitted is insufficient to determine if material facts are at issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

To establish a prima facie case of retaliatory or discriminatory action by Respondent, a complainant must establish that his employer is subject to coverage under the environmental statute(s), and that he is a covered employee under the act. *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-34 (11th Cir. 1995). The complainant must also show that he engaged in protected activity, that he was subject to adverse employment action, that his employer was aware of the protected activity, and that a causal link exists between the protected activity and the adverse employment action. *Id.*; *Williams v. Lockheed Martin Corp.*, 1998-ERA-40, 1998-ERA-42, at 4 (ARB Sept. 29, 2000); see also *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252 (1981).

In his complaint, Complainant alleges that Respondent violated the following seven environmental statutes: Clean Air Act; Comprehensive Environmental Response, Compensation & Liability Act; Safe Drinking Water Act; Solid Waste Disposal Act; Toxic Substances Control Act; Federal Water Pollution Control Act; and Resource Conservation & Recovery Act. In general, these statutes contain the same basic whistleblower provisions. All of the Acts prohibit an employer from discriminating against an employee for commencing, causing to be commenced, or preparing to commence or cause to be commenced a proceeding under the chapters of the respective Acts, or testifying or preparing to testify in any such proceeding. Several of the Acts (CAA, SDWA, and TSCA) include provisions that additionally prohibit an employer from discriminating against an employee for assisting or participating or preparing to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of the respective Acts. With regard to testifying in such proceedings, the FWPCA, SWDA, and CERCLA contain provisions that bring testifying in proceedings regarding the administration and enforcement of the provisions of the chapters of the respective Acts under whistleblower protection.

All of the Acts mentioned in the original complaint fall under the guise of the regulations found at 29 C.F.R. Part 24. Under 29 C.F.R. §24.2:

(b) Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has:

- (1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in §24.1(a) or a proceedings for the administration or enforcement of any requirement imposed under such Federal statute;
- (2) Testified or is about to testify in any such proceeding;
or
- (3) Assisted or participated, or is about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute.

Sections 24.2(c) and (d) contain additional regulations concerning the *Energy Reorganization Act*, 42 U.S.C. § 5851 (ERA). Section 24.2(c) essentially restates 42 U.S.C. §5851(a)(1)(A)–(C). Section 24.2(d) contains requirements for posting the employee protection provisions of the ERA at the workplace.²

The whistleblower provisions of the environmental statutes protect employees who make safety and health complaints to their own employers as well as to government agencies. *Post v. Hensel Phelps Constr. Co.*, 1994-CAA-13, at 2 (Sec'y Aug. 9, 1995); *Scerbo v. Consol. Edison Co. of New York*, 1989-CAA-2, at 3 (Sec'y Nov. 13, 1992). Protected activity under these Acts encompasses external and internal complaints regarding safety and environmental concerns. *See, e.g., Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985) (affirming the Administrative Review Board's finding that an internal complaint under the ERA constituted protected activity); *Masek v. The Cadle Co.*, 1995-WPC-1, at 7 (ARB Apr. 25, 2000) (finding that complaints to both local and state agencies concerning possible environmental hazards are protected activity). Complaints under these acts need not be formal, but instead, may be informal and made verbally to a supervisory figure. *See, e.g., Hermanson v. Morrison Knudsen Corp.*, 1994-CER-2, at 5 (ARB June 28, 1996). The Administrative Review Board has also held that protection is afforded to employees who make safety and health complaints grounded in conditions that constitute reasonably perceived violations of the environmental laws, but not when an employee has a mere subjective belief that the environment might be affected. *Kesterson v. Y-12 Nuclear Weapons Plant*, 1995-CAA-12, at 3 (ARB Apr. 8, 1997).

Complainant is currently the Coordinator of Minority Business Enterprises and Women Business Enterprises (MBE/WBE) for the Environmental Protection Agency ("EPA" or "Respondent") in Region 4. (Complaint, at 1). Complainant alleges that he is "being pressured to approve questionable, false flag 'Minority Business Enterprises'" and that concerns that he has voiced regarding EPA contracting constitute protected activity. (Complaint, at 1). As such, Complainant filed this claim "[p]ursuant to the environmental whistleblower laws." (Complaint, at 1). Complainant also states in his complaint that he "reasonably believes that EPA is not running the MBE/WBE program according to the MBE/WBE regulations." (Complaint, at 4). To this extent, Complainant states that quarterly reports from MBE/WBE grantees are not being checked by the MBE/WBE program against a master grantee list to ensure compliance with the MBE/WBE regulations because of staff limitations. (Complaint, 2-3). Complainant states that he has been "subjected to meetings with Water Division staff" and has also been the subject of inquiries by Congress, city administrators, and consulting engineers. According to Complainant, these inquiries are being made because those parties feel as though "the MBE/WBE program is delaying their program because he is following the MBE/WBE regulations." (Complaint, at 3).

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In its motion, Respondent argues that summary decision should be granted in favor of Respondent on several bases. While there are other elements necessary to establish a whistleblower complaint, this decision addresses only Respondent's assertion that Complainant has failed to show that he engaged in any protected activities prior to filing his complaint. This is so because a failure to establish any protected activities under any of the "environmental whistleblower statutes" renders the complaint beyond the jurisdiction of the U.S. Department of Labor. Respondent argues that because there are no genuine issues of material fact, Complainant has failed to set forth a claim upon which relief may be granted, and therefore, summary decision in favor of Respondent is proper.

Has Complainant Shown that He Engaged in Protected Activity?

1. Has Complainant Alleged Protected Activity with Sufficient Specificity?

Respondent argues that Complainant has not made a prima facie showing that he engaged in any protected activities. To support this argument, Respondent asserts that Complainant has failed to specifically state the protected activities in which he engaged. Respondent cites to *Greene v. Biro*, 2002-SWD-1 (ALJ Feb. 10, 2003), for the proposition that allegations must be specific and detailed, not vague, broad, and imprecise. *Greene v. Biro*, 2002-SWD-1, at 6-7 (ALJ Feb. 10, 2003) (noting that "While no DOL whistleblower cases address the degree of specificity needed to establish jurisdiction, the Merit Systems Protection Board ("MSPB") has addressed this question pursuant to the Whistleblower Protection Act, 5 U.S.C. §1221" and that the complaint before him lacked in specificity (citing *Keefer v. Dep't of Agric.*, 82 M.S.P.R. 687, 692 (1999); *Becker v. Dep't of Veterans Affairs*, 76 M.S.P.R. 292, 297 (1997))).

Respondent contends that during his discovery deposition,³ Complainant was asked specifically to whom complaints were made, what those complaints were, and when the complaints were made; however, Complainant was unable to answer those questions with any particularity. (Resp't Br. on Summ. Dec., at 9-11, fn.3). Instead, Complainant answered such questions by focusing on the EPA's alleged non-compliance with "Six Affirmative Steps" that grantees in the MBE/WBE program are to abide by before a contract is awarded to them. (Resp't Br. on Summ. Dec., at 9-11, fn.3 (citing numerous pages of the deposition transcript)). Respondent also recounts Complainant's testimony that he "raised his concerns to his supervisor but failed to specify when or what he said other than 'routinely, all the time . . . [m]aybe since the first day I was there.' . . . When asked what he told his supervisor, he replied, 'just what I'm saying. EPA is not—the grant—EPA not enforcing the environmental regulations.'" (Resp't Br. on Summ. Dec., at 11 fn.3 (quoting Dep. at 31-32)). When discussing Mr. Robbins, Complainant stated that he did not have a complaint against Mr. Robbins and that he (Mr. Robbins) had always supported Complainant. (Resp't Br. on Summ. Dec., at 20 (citing Dep. at 34-37)). Complainant also testified during his deposition that he allegedly disclosed his protected activity to grantees (but was not more specific). (Resp't Br. on Summ. Dec., at 20 (citing Dep. at 47)).

Respondent emphasizes that Complainant was unable to cite to a specific environmental statute that Respondent is allegedly violating or has violated other than referring to the statutes in general terms. (Resp't Br. on Summ. Dec., at 9, 11 fn.3). At one point, Complainant makes a general citation to 40 C.F.R. Parts 30, 31, and 35, but is unable to state with any further specificity what activities Respondent is engaging in that allegedly violates these regulations or what these regulations encompass. (Dep. at 32).

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In his response to the motion for summary decision, Complainant argues that he has engaged in protected activities because he has voiced concerns involving "government spending pursuant to special appropriations and regular environmental appropriations" and that Respondent has failed to ensure that Respondent and its contractors comply with MBE/WBE legal requirements. (Compl. Resp., at 5). Complainant also alludes that he engaged in protected activity by voicing concerns about "nationwide violations of environmental and contracting laws and contract provisions" and when he "rais[ed] concerns to managers and in response to Congressional inquiries . . . [that] go to the heart of governmental integrity in EPA's billions of dollars of environmental spending," but provides no further explanation on either of these points. (Compl. Resp. at 1, 8).

2. Do the Alleged Wrongdoings Pose a Threat of Environmental Harm?

Respondent next argues that Complainant has failed to assert that his protected activity included disclosing violations that have the potential to cause environmental harm. (Resp't Br. on Summ. Dec., at 13). Respondent cites to *American Nuclear Resources v. Department of Labor*, 134 F.3d 1292 (6th Cir. 1998), for the proposition that

whistleblower protection does not encompass "every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern." (Resp't Br. on Summ. Dec., at 12 (quoting *Am. Nuclear Res. v. Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998))). Respondent contends that even if EPA has violated the "Six Affirmative Steps" (mentioned above), Complainant has failed to show how the violation(s) could affect Respondent's enforcement or regulation of any environmental statutes or the purpose of such statutes. (Resp't Br. on Summ. Dec., at 13).

Complainant's only statement as to how environmental health and/or safety is implicated by violations allegedly committed by Respondent is that "Government and corporate whistleblower retaliators threaten public health and welfare and destroy lives and First Amendment values." (Compl. Resp. at 7 (footnote omitted)).

3. Resistance to Pressure to Approve "False Flag Minority Business Enterprises"

Respondent argues that Complainant's allegation that he has resisted pressure to approve "questionable false flag Minority Business Enterprises" does not represent a genuine issue of material fact as to whether he engaged in protected activity because the allegation is not credible. (Resp't Br. on Summ. Dec., at 14 (citing Complaint, at 1)). Respondent cites to its questioning of Complainant during his deposition about this particular terminology. Complainant appeared unfamiliar and stated that he had not heard of that term. Respondent maintains that this answer calls into question Complainant's sworn testimony earlier in the deposition that he read and signed his complaint and was familiar with its contents. (Resp't Br. on Summ. Dec., at 14 (citing Dep. at 21, 50-53)). According to Respondent, this testimony also conflicts with other statements made by Complainant during his deposition in which he stated that he had "had no problems with whether a business qualifies as an 'MBE' or 'WBE' and that he does not look behind their routine representations that they are minority or women owned businesses." (Resp't Br. on Summ. Dec., at 14 (citing Dep. at 66-68)). Respondent asserts that the allegation that Complainant has resisted pressure to approve "questionable false flag Minority Business Enterprises" is therefore not credible and thus cannot be considered protected activity. Even if it was a credible allegation, Respondent argues that Complainant has not shown how this activity implicates an environmental protection statute. (Resp't Br. on Summ. Dec., at 14).

Complainant did not respond to this portion of Respondent's Motion.

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4. MBE/WBE Program and Regulations

Respondent asserts that Complainant's allegation that he has raised concerns that the MBE/WBE program is not being conducted in accordance with MBE/WBE regulations does not implicate any violation of environmental protection statutes, even if Complainant's allegation was true. (Resp't Br. on Summ. Dec., at 15). In support of this

argument, Respondent maintains that Complainant has improperly and erroneously interpreted the applicable statutes and regulations regarding his authority in approving grantees' bids and committing money to these grantees. (Resp't Br. on Summ. Dec., at 15-17). Respondent highlights two of Complainant's contentions in this respect: Complainant's allegation that bid packages must be approved by him prior to contracts being awarded, and his allegation that grantees are spending money before Respondent officially commits money to the grantees. (Resp't Br. on Summ. Dec., at 15 (citing Complaint, at 3; Dep. at 11)). As to the first complaint, Respondent maintains that Complainant's job is to review grant packages for documentation of compliance with the "Six Affirmative Steps," and that this phase must be completed prior to the release of funds by Respondent; however, Complainant does not participate in the actual approval of grant packages. (Resp't Br. on Summ. Dec., at 15). As to the second complaint, Respondent states that Congress has the authority, which it regularly utilizes, to "officially commit" funds to projects. (Resp't Br. on Summ. Dec., at 15).

Respondent also addresses Complainant's allegations that he has voiced concerns that the MBE/WBE program is not involved when the EPA's Direct Procurement Section and the Bank Credit card expenditures program determines compliance with the MBE/WBE regulations, and that quarterly reports submitted by grantees are not cross-checked against a master list to determine whether the grantees are complying with regulations. (Resp't Br. on Summ. Dec., at 16-17). Respondent states that the Direct Procurement Section is responsible for determining its compliance with any applicable requirements. Further, Respondent states that there is no link established by Complainant between either of these activities and an environmental protection statute. (Resp't Br. on Summ. Dec., at 17).

Complainant states in his response that "EPA, Mr. Robbins and Mr. Mills now admit that Mr. Santamaria raised concerns about the Minority Business Enterprise (MBE) and Women-owned Business Enterprise (WBE) program. . . . Mr. Santamaria raised valid protected concerns about EPA not enforcing laws governing EPA environmental contracting work, including failure to verify compliance with MBE/WBE 'Six Affirmative Steps' duties." (Compl. Resp., at 3). Complainant states that he also raised valid protected concerns about the following: "(1) EPA not enforcing environmental regulations on states, counties, cities and colleges; (2) EPA grantees not complying with environmental regulations before the [*sic*] start work; (3) EPA grantees spending money before EPA approves it; (4) EPA grantees finishing the projects before they get grants and before plans and specifications are every [*sic*] approved, making it impossible to verify compliance with the Six Affirmative Steps and other EPA requirements until the job is already done." (Compl. Resp., at 3 (citing Dep. at 7-11; 40-138)).

Complainant cites to the declaration of Keith Mills (RX-N, ¶¶ 13-15), in which Mr. Mills discusses his request that Complainant attend a meeting with the contract specialists to explain his job. (RX-N, ¶ 11). Mr. Mills stated that Complainant instead asked Jeanette Brown, Director of the EPA's Office of Small and Disadvantaged Businesses Utilization in Washington, D.C., speak with the contract specialists regarding the duties and responsibilities of MBE/WBE Coordinators such as Complainant. (RX-N, ¶ 13).

According to Mr. Mills, he believed that Complainant should have been able to adequately explain his duties to the contract specialist, and objected to Ms. Brown attending the meeting. (RX-N, ¶¶ 14-15). Complainant states that his "concerns are protected activity, as the requirements of federal law are incorporated into every EPA contract." (Compl. Resp., at 3).

5. Objectively Improper Conduct

Respondent next argues that Complainant has not engaged in any protected activity grounded in conditions that constituted reasonably perceived violations of environmental statutes by Respondent. Respondent asserts that it provided Complainant with several opportunities during his deposition to expound upon which specific environmental protection laws he believed Respondent had violated; however, each time, Complainant responded with broad, sweeping statements such as "entire environmental regulations" instead of specific environmental laws and/or regulations. (Resp't Br. on Summ. Dec., at 18 (citing Dep. at 7-13, 32-35, 131-36)).

Complainant did not respond to this portion of Respondent's Motion.

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Complainant Has Not Established That This Office Has Jurisdiction Over His Complaint

As a matter of law, pursuant to the employee protection provisions of the above-named environmental statutes, Complainant must make a prima facie showing that he engaged in protected activities in order to establish that this office has jurisdiction over his complaint. Examining the record in the light most favorable to Complainant and drawing all inferences in his favor, I find that Complainant has failed to establish that a genuine issue of material fact exists with regard to whether he engaged in any protected activities. Because no genuine issue of material fact has been established, Respondent is entitled to judgment as a matter of law.

I find persuasive the language in *Greene v. Biro*, 2002-SWD-1 (ALJ Feb. 10, 2003), in which the Administrative Law Judge discussed a complaint that he found lacked sufficient specificity to establish jurisdiction. *Greene v. Biro*, 2002-SWD-1, at 6-7 (ALJ Feb. 10, 2003). In that whistleblower case, the ALJ found that the complainant had "not provided specific claims regarding the nature of her protected activity" and had "not articulated any relationship between her alleged protected activity and the purpose of any pertinent environmental statute." *Id.* at 7. The ALJ noted that the complainant before him did not specify, among other things, the content of disclosures, the person to whom the disclosures were made, and when the disclosures were made. *Id.* Therefore, the ALJ dismissed the case for failure to allege subject matter jurisdiction. *Id.* at 6. In reaching this finding, the ALJ discussed two Merit Systems Protection Board ("MSPB") cases, which addressed the issue of specificity of whistleblower complaints. The MSPB found that "[t]o be entitled to protection, disclosures must be specific and detailed, not vague

allegations of wrongdoing regarding broad imprecise matter." *Id.* at 7 (citing *Keefer v. Dep't of Agric.*, 82 M.S.P.R. 687, 692 (1999); *Becker v. Dep't of Veterans Affairs*, 76 M.S.P.R. 292, 297 (1997)).

As the ALJ in *Greene* stated, no Department of Labor whistleblower case had as of then discussed the degree of specificity needed to establish jurisdiction; however, I find that the same principles of specificity discussed in *Greene* should apply in the instant matter, because without such, Complainant cannot establish that he has engaged in protected activity such that this office has jurisdiction over the instant matter. Complainant has been provided with opportunities to expand upon the broad, unspecific alleged protected activities alluded to in his complaint. He was deposed on January 8, 2004, and was repeatedly asked by counsel for Respondent as to what specific complaints he had made, to whom he made the complaints, when the complaints were made, and on what specific environmental statutes he based his complaints. (Dep. at 31-35, 47-50, 126). Each time, Complainant answered either with a broad, sweeping answer that he "routinely" made complaints to his supervisor, or by referring to the "Six Affirmative Steps," or by simply avoiding the question as posed to him.

At the end of the deposition, counsel for Respondent provided Complainant another, open-ended opportunity to discuss what environmental regulations he believed Respondent was violating and to whom he disclosed the alleged violations. (Dep. at 132-38). Again, Complainant discussed only the "Six Affirmative Steps" and referred to them as being part of the "environmental regulations." He stated that he had disclosed violations of the "Six Affirmative Steps" to his supervisor (Mr. Robbins), as well as to Dorothy Rayfield,⁴ Eddie Springer,⁵ Leif Palmer,⁶ the Director of Small and Disadvantaged Businesses in Washington, D.C.,⁷ and at "all the national meetings." (Dep. at 132-36). Still, Complainant did not recount specific instances of conversations with any of these individuals or what specific alleged violations Respondent engaged in that would have led him to complain to any of his supervisors.

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Protected activity must relate to a safety and/or health concern resulting from the reasonably perceived violation of an environmental statute. *Kesterson v. Y-12 Nuclear Weapons Plant*, 1995-CAA-12, at 3 (ARB Apr. 8, 1997). Complainant never articulated a specific safety or health concern that had or would potentially result from Respondent's alleged violations. The only specific regulations that Complainant ever referred to was a general citation to 40 C.F.R. Parts 30, 31, and 35. (Dep. at 32, 49). These regulations refer to the administrative requirements for grants to higher education institutions, hospitals, and other non-profit organizations (Part 30); the administrative requirements for grants to state and local governments (Part 31); and assistance provided to state and local agencies (Part 35). These regulations do not encompass any safety and/or health matters. Complainant need not cite a specific statute or regulation to establish a violation thereof. *Williams v. Mason & Hanger Corp.*, 1997-ERA-14, at 16 (ARB Nov. 13, 2002) (citing *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1507 (10th Cir. 1985), *aff'g sub*

nom. Wells v. Kansas Gas & Elec. Co., 1983-ERA-12 (Sec'y June 14, 1984)). However, Complainant does need, in this stage of the proceedings, to show that a genuine issue of material fact exists as to his protected activity, which must be related to a safety and/or health concern resulting from the reasonably perceived violation of an environmental statute.

There is also merit in Respondent's argument that Complainant did not state a credible allegation when he alleged that he engaged in protected activity when he resisted pressure to approve "false flag Minority Business Enterprises." Complainant was clearly unfamiliar with the term when Respondent's counsel questioned him about it. (Dep. at 51-53). Complainant's unfamiliarity with that terminology is clearly in contradiction to his testimony that he read and wrote his complaint. (Dep. at 21). Complainant also testified that he had had no problems with whether a business qualifies for MBE or WBE status also speaks against the credibility of this allegation. Because this allegation is not credible, I find that it does not establish a genuine issue of material fact.

With regard to Complainant's allegation that he has raised concerns that the MBE/WBE program is not being conducted in accordance with MBE/WBE regulations, Complainant has not shown that a genuine issue of material fact exists as to whether his complaints on this subject constitute a protected activity. Even taking this issue in the light most favorable to him, Complainant's constant references to Respondent allegedly violating these regulations without any further explanation as to how these alleged violations relate to a safety and/or health concern are again insufficient to show that a genuine issue of material fact exists with regard to protected activity.

Further, Complainant mischaracterizes his own deposition testimony when referring to it in his response to Respondent's motion. Complainant stated in his response that he had voiced concerns about "EPA is not enforcing environmental regulations on states, counties, cities and colleges." (Compl. Resp., at 3 (citing Dep. at 7-11)). However, Complainant's actual statement during his deposition regarding the concerns he had voiced was "The Environmental Protection Agency is failing to enforce on the state, on the county, on the city, on the towns, on colleges and universities, on nonprofit organization ***is failing to enforce the MBE/WBE rules, regulations, and guidelines***. But really, the point is that is environmental law, and that's what the EPA is supposed to be enforcing and is not making sure that those grantees and contractors comply with that law." (Dep. at 8 (emphasis added)). Complainant's other statement in his response that he had voiced concerns regarding "EPA grantees not complying with environmental regulations before the [*sic*] state work" is similarly mischaracterized because in the context of the deposition, Complainant consistently referred to alleged violations of the MBE/WBE regulations, and not to alleged violations of environmental regulations that would implicate a safety and/or health concern.

While it is true that Respondent is charged with carrying out the regulations alluded to by Complainant, it is also true that, for a complaint to fall within the jurisdiction of this office, Complainant must show that the enforcement or purpose of an environmental statute or regulation designed to protect health and safety has potentially been affected by

Respondent's violation. Simply being an employee of the Environmental Protection Agency does not mean that any complaint that Complainant may have against the EPA qualifies as protected activity. As stated by the Administrative Review Board in *Kesterson v. Y-12 Nuclear Weapons Plant*, 1995-CAA-12 (ARB Apr. 8, 1997), an employee's subjective belief that the environment might be affected is not enough to afford an employee whistleblower protection. *Kesterson v. Y-12 Nuclear Weapons Plant*, 1995-CAA-12, at 3 (ARB Apr. 8, 1997).

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Complainant could have explained in more detail his alleged protected activities in his response to Respondent's motion for summary decision, but again did not provide any additional information that might show that he engaged in protected activity other than to provide a non-responsive argument. The allegations of protected activity as they stand, without further specificity, and without further evidence as to their connection to any health or safety concern stemming from the alleged violation of any of the environmental statutes that Complainant names are insufficient to afford Complainant any whistleblower protection. Therefore, Complainant has not shown a genuine issue of material fact with regard to alleged protected activity.

Complainant's actions in complaining to his supervisors and others that the EPA was failing to enforce the MBE/WBE rules, regulations, and guidelines may constitute the basis for a complaint under the jurisdiction of the Equal Employment Opportunity Commission. However, the MBE/WBE rules, regulations, and guidelines are not a part of the "environmental whistleblower statutes" under the jurisdiction of the U.S. Department of Labor. Complainant's activity would have been exactly the same if he were employed by an agency which has nothing to do with environmental protection, such as the Federal Reserve System. The fact that Complainant is an employee of the EPA does not automatically mean that because he complained about enforcement of the MBE/WBE rules, regulations, and guidelines, and because the EPA is charged with enforcement of environmental laws, that he has complained about enforcement of environmental laws. The complaint in this case simply does not allege that he engaged in any activity protected by the statutes under the jurisdiction of the U.S. Department of Labor.

As Complainant has failed to establish that he engaged in any protected activity, I find that this office does not have jurisdiction over the instant matter, and therefore, it is proper to grant Respondent's Motion for Summary Decision and to deny Complainant's complaint. It necessarily follows that Complainant's Motion to Compel Discovery from Respondent must also be denied. The Administrative Review Board has previously held that if "[d]iscovery would not . . . change[] the speculative basis of Complainant[']s assertion that [he] engaged in activity protected by" environmental statutes, it is proper to deny a discovery motion. *Johnson v. Oak Ridge Operations Office*, 1995-CAA-20, at 11 (ARB Sept. 30, 1999).⁸ The ARB has also found, in a summary decision matter, discovery to be unnecessary when a complainant cannot meet the evidentiary burden of certain elements of his cause of action of which he has personal knowledge (such as his

protected activity). *See Freel v. Lockheed Martin Energy Sys.*, 1994-ERA-6, 1995-CAA-2, at 9 (ARB Dec. 4, 1996) (cited in *Johnson*, 1995-CAA-20, at 11). Complainant's allegations that he engaged in protected activity fall into the nature of speculation; therefore, I find that further discovery in this matter would be unnecessary.

Within a footnote of Complainant's Response, Complainant again objects to Respondent referring to itself as "the Government." (Compl. Resp., at 14 fn.14). Complainant previously made a similar objection in his motion filed January 24, 2004. That motion was ruled upon in an order issued January 28, 2004, at which time I rejected Complainant's request that Respondent not refer to its exhibits as "Government Exhibits." In that order, counsel for Complainant was cautioned as to making frivolous motions. In his current response, Complainant makes additional arguments on this point and requests that this Court "reconsider his ruling in light of the revelations." (Compl. Resp., at 14 fn.14). Complainant's request remains frivolous and his arguments without basis, and therefore, I again reject his request.

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ORDER

Accordingly, the following recommended order will issue:

1. The motion of Respondent, U.S. Environmental Protection Agency, for summary decision is hereby GRANTED;
2. The complaint of Rafael Santamaria alleging violations of "environmental whistleblower laws" by Respondent is DENIED; and
3. Mr. Santamaria's motions for summary decision and to compel discovery are both DENIED.

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.

[ENDNOTES]

¹ A copy of the January 28, 2004, order as well as a copy of Complainant's deposition was sent to Complainant's counsel via United States Postal Service Express Mail on January 28, 2004, to the post office box indicated by Complainant's counsel as his current and correct address. According to the tracking information, the package arrived at the post office in St. Augustine, Florida, on January 29, 2004, and a notice was left in Counsel's post office box that same day. Another notice was left in Counsel's post office box on January 30, 2004. The package was delivered at 11:45 a.m. on February 2, 2004, and was signed for by "D. Wallace."

² The Complaint makes no references to the ERA, but instead refers only to "environmental whistleblower laws", and sets forth no allegation that could possibly relate to the ERA. When this matter was investigated by the Regional Administrator for the Occupational Safety and Health Administration, the reference to the ERA first occurred. This reference was then incorrectly used by this Office's docket section, which logged the case in as an "ERA" whistleblower complaint. As the case does not involve the ERA, all references to the ERA are considered typographical errors.

³ The deposition is hereinafter cited to as "Dep."

⁴ Ms. Rayfield is the Acting Chief of Permits, Grants, and Technical Assistance for the Water Management Division of the EPA. (RX-I, at ¶ 2).

⁵ While Complainant mentions Mr. Springer at other times during the deposition, he alludes only to Mr. Springer's job title/duties as being in the "Grants" division. (Dep. at 122).

⁶ According to Complainant, Mr. Palmer is the "attorney that handles the OPM Division legal matters." (Dep. at 123).

⁷ Presumably Complainant is referring to Jeanette Brown, Director of the EPA's Office of Small and Disadvantaged Businesses Utilization in Washington, D.C.. (See RX-N, ¶ 13 (discussed above)).

⁸ *Johnson* was before the ARB on a recommended decision and order to dismiss the complaints for untimeliness and because the complainants failed to establish a prima facie case of a violation of certain environmental acts (including CAA, CERCLA, SDWA, and SWDA), in that the complainants failed to allege activities that would be protected if such were found to be true. *Johnson*, 1995-CAA-20, at 6, 9.